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63D CONGRESS, 2d Session } SENATE 113 { DOCUMENT No. 539

THE TREATY-MAKING POWER UNDER THE CONSTITUTION

ARTICLE

ON

THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES

By

HENRY SAINT GEORGE TUCKER

PRESENTED BY MR. WORKS

APRIL 22, 1914.—Referred to the Committee on Printing

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

REPORTED BY MR. CHILTON.

IN THE SENATE OF THE UNITED STATES,
July 9, 1914.

Resolved, That the article submitted by Mr. Works on April twenty-second, nineteen hundred and fourteen, entitled "The Treaty-Making Power under the Constitution of the United States," by Henry Saint George Tucker, of Lexington, Virginia, be printed as a Senate document.

Attest:

JAMES M. BAKER, *Secretary.*

Mar 27, 1916

Mar. 27, 1916

THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES.[1]

The recent action of the State of California in passing an act prohibiting aliens ineligible to citizenship in the United States from holding land in that State has produced wide discussion, and brings us face to face with the question whether a treaty between the United States and any foreign country which guarantees to the inhabitants of such country the right to hold land within the bounds of the United States is a constitutional treaty and valid, as against the law of a State of the Union prohibiting such holding by such foreigners. No question of more far-reaching effect than this has arisen in our political history within the past few years.

The advocates of the affirmative of this proposition for the most part rest their conclusions upon the fact that the Constitution of the United States in words declares that the treaty is the supreme law of the land; and it is also urged, the treaty being an exercise of national power upon subjects which can be treated of by the Federal Government alone, affecting all the citizens of each country bound by the treaty, that to permit the people of one State, which may be the smallest State in the Union, by its independent and antagonistic action to defeat a treaty whose beneficent effects are intended to reach all the people of the United States should not be allowed from the standpoint of justice to the great body of the people of America. The argument ab inconvenienti is persuasive and often effective, but can not be admitted in the consideration of constitutional rights. If such power exists in the State of California, and is an evil, it should be changed; but let us not be misled into undertaking by indirection what should be met frankly and by constitutional means. We can well afford to follow Washington and Lincoln on this subject. The former said:

> If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it may in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed.

Mr. Lincoln used this language:

> It is my duty and my oath to maintain inviolate the right of the States to order and control under the Constitution their own affairs by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest.

Article VI, section 2, of the Constitution of the United States is as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[1] Reprinted from the North American Review of April, 1914.

It will be noticed in this section that not only are treaties made "under the authority of the United States" the supreme law of the land, but the same section also declares, "This Constitution, and the laws of the United States which shall be made in pursuance thereof," are also the supreme law of the land; that is, the Constitution, which embraces among many powers the treaty-making power, is the supreme law of the land. It is doubtful, under proper construction, whether, in order to give supremacy to the treaty-making power, it was necessary to mention it at all after proclaiming that the Constitution, which included the treaty-making power, was supreme. For does not the greater include the less? In this clause it is also noted that "this Constitution" is placed first, "the laws of the United States which shall be made in pursuance thereof" second, "and all treaties made" is placed after the other two. This clause does not single out the treaty-making power alone as supreme, but it designates two others as supreme and carefully enumerates them with the treaty-making power, and if the location of each in the sentence is to be reckoned according to its importance, the first two, that is, "this Constitution, and the laws made in pursuance thereof," would be prior in dignity to treaties. If the Constitution which includes the treaty-making power, as well as many others, be the supreme law of the land, as can not be denied under this clause, is a treaty which violates the Constitution supreme? Is there anything in the clause which justifies holding a treaty supreme though clearly invading forbidden ground and denying the same to a law of Congress clearly unconstitutional? Can the Constitution be supreme when it embraces in its folds an adder whose fangs may sting it to death? Can supremacy be predicated of any instrument that contains the badges of its own subordination? Can the Constitution be supreme in every article, in every section, in its whole scope and breadth, in its varied functions, and in its enumerated powers, if one power may destroy another, or one power destroy the whole? It is clear from this section that the law of the United States to be the supreme law of the land must be made in pursuance of the Constitution; whereas no such limitation is put upon "all treaties made, or which shall be made," but there is substituted for the words "which shall be made in pursuance thereof" the words, "under the authority of the United States." Are not the two phrases equivalent? If not, then a law of Congress will be unconstitutional and void because against the Constitution, and a treaty constitutional and supreme though it violates the Constitution. "Under the authority of the United States" means under the authority of the Government of the United States. The words "United States" as here used mean the Government of the United States established by the Constitution and not "the political society which lies back of that organic law and which was its author." If this be true, we must examine the Constitution in its whole scope when examining a treaty to see whether such treaty is in accordance with the Constitution; for as Judge Cooley says:

> The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. (Constitutional Law, p. 33.)

There are powers which the Federal and State Governments may each employ, known as "concurrent" powers; and when in the use of such powers the Federal Government acts by legislation, though

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the State has likewise acted, the Federal power must prevail, for constitutional laws of Congress are the supreme law of the land, and the State law must yield; but not so if the law of Congress embraces a subject which is reserved to the States or forbidden to the Federal Government, for then the law of Congress is not in pursuance of the Constitution that declares, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." (Tenth amendment.) If the treaty-making power be indeed supreme over all State laws, then a treaty containing provisions for the benefit of foreigners may create greater rights for such foreigners within a State than the citizens of the several States may have in that State. State laws prescribing conditions of suffrage or of holding office may be swept aside by a treaty giving such right to an alien, and permitting him to vote or hold office in any State when the citizen of a sister State would be debarred from voting or holding office in such State, though he may claim the protecting power of his own Constitution in that clause which may properly be termed the clause of "American hospitality," to wit:

> The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. (Art. IV, sec. 2, Constitution U. S.)

The negro citizen of New York can not, under this clause just quoted, force himself into the schools of Texas, or claim to be exempt from the law of Texas requiring him to ride in separate railroad coaches from those assigned to the whites; but if the claim of power here asserted be correct, the negro from Haiti or the Kongo may under a treaty be free to enter the schools of Texas, and ride in any coach on a railroad that may suit his tastes, notwithstanding the law of Texas to the contrary. The laws of marriage and divorce, which are derived from the States alone and which are the bulwarks of our social fabric may in like manner be abrogated in favor of aliens under the provisions of a treaty. Is the citizen of America thus to be despoiled of rights that "aliens to the commonwealth of our Israel" may boastfully disport themselves in? Is American citizenship to be a badge of inferiority, and the alien to be preferred in honor to the native-born American? If so, we may indeed repent in sackcloth and ashes that we have sold our birthright for a mess of pottage.

It will not do to say that the treaty-making power would never be used in a way to subordinate the rights of American citizens to those of aliens. The argument is complete if it is shown that such a power exists; and in the above case Texas is able to protect itself against the New York negro, but would be utterly helpless as against the foreign negro protected by the provisions of a treaty.

An examination of the sources of these powers, Federal and State, may serve to a clearer vision of the subject. By the Hamiltonian school of statesmen it is claimed that the Constitution was the product of one body politic—the whole mass of the people of the United States, giving the Federal Government the large powers contained therein and denying certain powers to the States, as well as certain others to the Federal Government; and that this body politic, the United States, antedated the States, and in effect created them,

etc. The Jeffersonian school holds that the States, prior to the adoption of the Constitution, existed as independent sovereigns; that they created the Constitution by proposing it to the people of the several States, who ratified it, and that from the reservoir of their original powers they granted certain ones to the Federal Government, denied others to the States, reserving all others "to the States respectively, or to the people." While historically we hold the latter view, the adoption of either will serve our purpose in showing that the reserved rights under the tenth amendment, secured in either of the above-mentioned methods can no more be taken from the States than can any power granted to the Federal Government be taken from it. Under the Hamiltonian school each power, Federal and State, has a common origin and a common grantor; each is a part of the same Constitution, each is supreme in its sphere because the Constitution, which embraces both, is confessedly supreme. There is one reservoir from which flowed all powers—the people of the United States as one body politic. The same body politic delegated the enumerated powers as given in the Constitution to the various departments of the Federal Government, and then declared that all powers not delegated were reserved "to the States respectively, or to the people"; and when the Constitution was pronounced the supreme law of the land this supremacy was infused into every part of it, into every section and every paragraph of it. The supremacy of the judicial power, of the legislative power, and of the executive power in the Federal Government in their respective spheres, was complete and unchallenged, while the powers not delegated, but which were reserved "to the States respectively, or to the people," were left undisturbed by the Constitution as not needed by the Federal Government; and because the supremacy of the Constitution declared in Article VI pervades every part of it, and the tenth amendment is as much a part of it as Article VI, or any other section of that instrument, the reserved powers contained therein are, in their sphere, equally supreme and subordinate to no other power in the Constitution.

By the Jeffersonian school it is held that the Constitution was proposed by the thirteen original States as independent bodies politic. Each gave up certain of its original sovereign powers to the Federal Government and for the good of all denied to the States the use of certain other powers. They gave freely of national powers, denied themselves without stint, and left in the possession of each State all other powers. They gave part and retained part. They gave up national powers and retained local powers. So that without the declared supremacy of the Constitution in Article VI these reserved powers referred to in the tenth amendment were supreme in their sphere. With Article VI they are doubly so.

Judge Cooley, in his work on Constitutional Law, page 30, strongly confirms our view:

> To ascertain whether any power assumed by the Government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by the Constitution of the United States or that of the State prohibited to be exercised at all. The presumption must be that

the State rightfully does what it assumes to do until it is made to appear how, by constitutional concession, it has divested itself of the power, or by its own constitution has, for the time, rendered the exercise unwarrantable.

To which of the Governments, Federal or State, we ask, does the tenure of real estate belong? I make bold to declare that no reputable authority can be found denying the right of the States to control the tenure of real estate within their bounds; and without burdening this paper with authorities I shall content myself with quoting the language of Justice Field, who delivered the opinion of the court in the case of The United States *v.* Fox (94 U. S., 320), as settling this question:

> The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. (McCormick *v.* Sullivant, 10 Wheat., 202.)
>
> The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purpose for which the Federal Government was created and would seriously embarrass the landed interests of the States.

Judge Story, a strong advocate of the supremacy of the treaty-making power, in section 1508 of his work, uses this language, speaking of the treaty-making power:

> But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it, and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate any other. A treaty to change the organization of the Government or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers would be void, because it would destroy what it was designed merely to fulfill, the will of the people. (Referring in a note to Tucker, Rawle, Elliott's Debates, and Jefferson.)

If, as Judge Story says, no power in this Constitution is authorized to destroy another power, what results when a treaty, exercising a supreme power, attempts to destroy a right which the Supreme Court, through Judge Field, has declared is a right which under the Constitution belongs exclusively to the States and which is therefore included among those rights reserved in the tenth amendment? If my premises be correct, the conclusion is inevitable that such treaty is invalid.

While the treaty-making power seems unlimited, all of the authorities admit there are limitations to its supremacy. Pomeroy, in his work on Constitutional Law, one of the strongest presentations that I have seen for the supremacy of the treaty-making power, page 567, says:

> But I think it is equally certain that a treaty would be a mere nullity which should attempt to deprive Congress, or the judiciary, or the President of any general powers which are granted to them by the Constitution. The President can not, by a treaty, change the form of government or abridge the general functions created by the organic law.

Judge Cooley, in his Principles of Constitutional Law, page 117, says:

> The Constitution imposes no restrictions upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the Government, or any of the States of its constitutional authority.

Judge Story, in the passage already quoted from his work, section 1508, says, "But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State." We could rest the case on Judge Story's statement, and why not? If, as Mr. Pomeroy says, this power can not be used to deprive Congress, or the judiciary, or the President, of their powers, how can it be claimed that it can deprive the States of their powers? State powers are either secured by the Constitution or they are not. If secured, in their sphere they are supreme under the tenth amendment; if not secured therein, they remain the original powers of sovereign States. Are State powers less protected under the Constitution than those granted to Congress, the judiciary, and the President? In the view of the Hamiltonian school of construction, supra, does not the Constitution, which is supreme in its whole scope, include the reserved powers of the States as contained in the tenth amendment, as well as the grants to Congress, the judiciary, and the President? And in the view of the Jeffersonian school of construction, supra, these State powers being reserved by the States and never given up, are therefore not brought under the cover of the Constitution, but are left in their original pristine vigor and so declared by the Constitution in the tenth amendment.

Supremacy admits of no limitations, exceptions, or conditions, and yet Story, Cooley, Pomeroy, and others admit that the treaty-making power is not supreme in its power to destroy the powers of Congress, the judiciary, or the President; surely such admissions must be fatal to the general claim of supremacy. Some authorities claim that this power is supreme, but that it can not, in the exercise of this supremacy, change the form of government or change the organization of the Government, while Story, Cooley, Tucker, and others say it can not destroy "the fundamental laws of the States." Now, what is our form of government? Clearly, one which recognizes the Federal Government as the agent for all the States, for their common good, in war, in peace, in commerce, and taxation. Wherever our relations touch foreign nations, there the hand of the Federal Government must regulate, for there the people of each State are equally interested with the people of every other State; but this Federal power can not intrude into those things which affect the people in their separate State life, their county life, their district life, their neighborhood life, their home life, for these interests have been properly relegated by all authorities to the control of their States, their counties, and their districts.

The people of Maine can better determine for themselves what is best for themselves in their everyday life than can the people of California determine this for them. This Saxon principle we brought with us from the forests of Germany to England, and the mother country has been enriched by the blood of our fathers spilled in its defense. Climatic and racial considerations, as well as religious

and social, make it clear that the people of each State should on every account be permitted to control their local policies without the interference of others. This nice adjustment of powers and duties under our Constitution has been the glory as well as the strength of America.

In matters in which all are equally interested the Federal Government acts for all. In matters in which localities only are interested no other power is permitted to interfere. In national affairs we are a unit; in local matters we represent 48 distinct and independent units, with laws, institutions, social customs, religious affinities, and aspirations as distinct as the billows. The strength of our Government has been from the beginning in the recognition of these two principles—not antagonistic, but mutually helpful—and while there have been, undoubtedly, in our history difficulties in adjusting the exact line dividing these powers, yet it must be admitted that the Supreme Court, with even-handed justice, has maintained the equilibrium without a jar to the great fabric and has faithfully repelled the aggressions by each upon the other with steady and even-handed justice.

Chief Justice Chase, in Texas *v.* White (7 Wall., 725), has well stated the mutual relations of the Federal Government to the States and the States to the Federal Government:

> Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States.

How, may it be asked, can the preservation of the States be maintained if rights admittedly accorded to them can be taken from them by the Federal Government?

In the Virginia convention of 1788, when the opponents of the Constitution, led by Patrick Henry, claimed that the treaty-making power was unlimited and therefore unwise, etc., Mr. Nicholas replied:

> The worthy member says that they can make a treaty relinquishing any rights and inflicting punishments because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the sixth article is that this Constitution and the laws of the United States shall be the supreme law of the land. They can by this make no treaty which shall be repugnant to the spirit of the Constitution or inconsistent with the delegated powers. The treaties they make must be made under the authority of the United States to be within their province. It is sufficiently secured because it only declares that in pursuance of the power given they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular States. (3 Elliott's Debates, 507.)

The validity of a treaty carrying an appropriation has frequently been the subject of acute discussion in Congress. Since Congress alone can appropriate money, the House has insisted that a treaty providing for an appropriation of money must be submitted to the House. This question arose first under the Jay treaty, negotiated by President Washington in 1795, and by a vote of 63 to 36 the House asserted its prerogative.

Mr. Madison, then a Member of the House of Representatives, and as the father of the Constitution possessing the best right of any man of his day to speak to this subject, said:

He would appeal to the committee to decide whether it did not appear from a candid and collective view of the debates in those conventions, and particularly in that of Virginia, that the treaty-making power was a limited power, and that the powers in our Constitution on this subject bore an analogy to the powers on the same subject in the Government of Great Britain. * * * On a review of these proceedings, may not the question be fairly asked whether it ought to be supposed that the several conventions—who showed so much jealousy with regard to the powers of commerce, of the purse, and of the sword as to require for the exercise of them in some cases two-thirds, in others three-fourths of both branches of the legislature—could have understood that by the treaty clauses in the Constitution they had given to the President and Senate, without any control whatever from the House of Representatives, an absolute and unlimited power on all these great objects. (The Life and Times of James Madison. Rives, pp. 558, 559.)

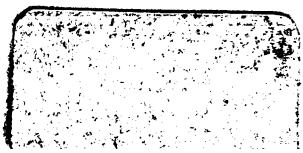
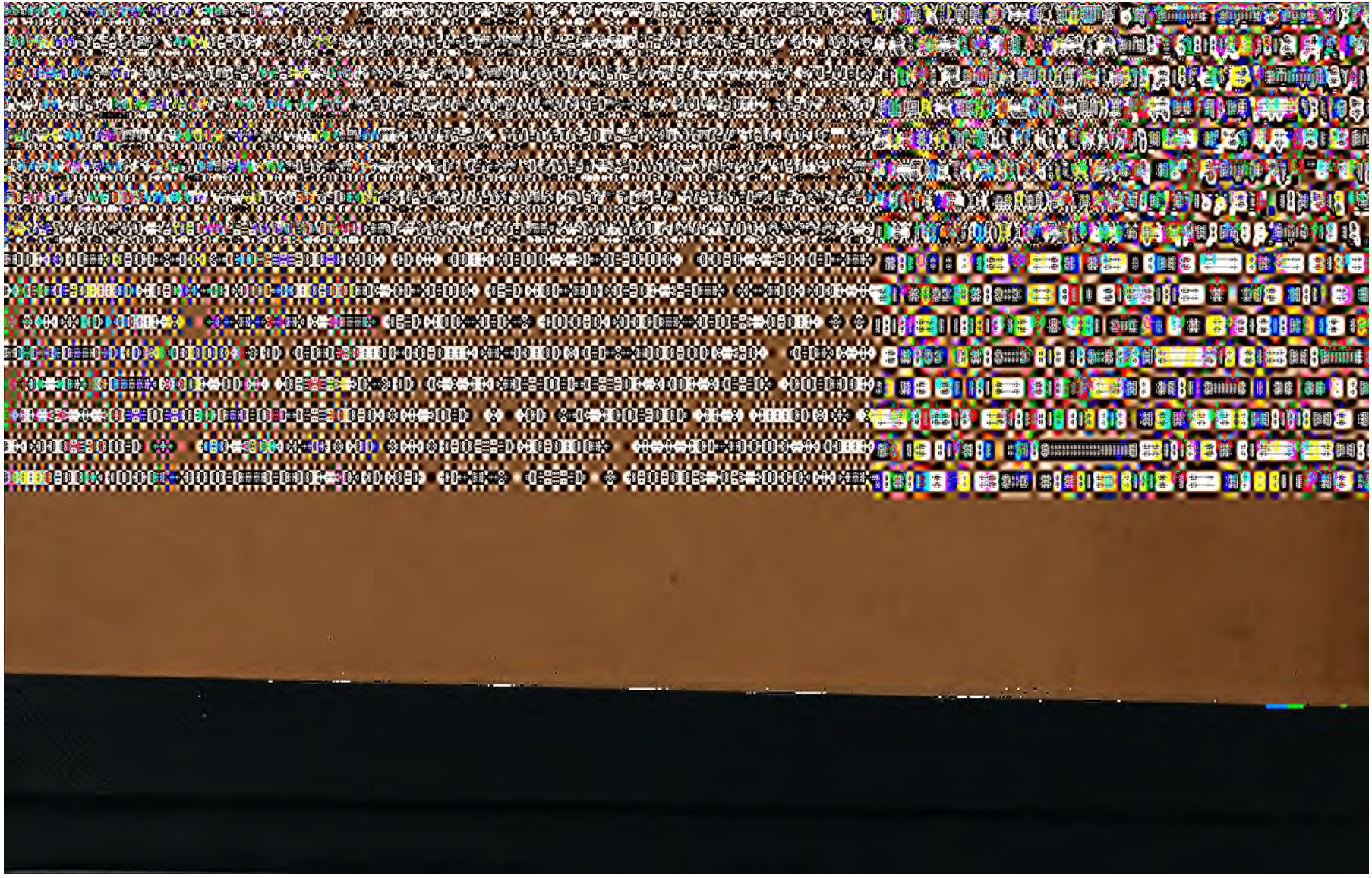
In 1814 the treaty of Ghent, carrying provisions as to duties on articles imported from Great Britain, was transmitted by Mr. Madison as President to Congress, recommending to them to pass the needed legislation. President Grant followed the same precedent during his term, and in July, 1867, by a vote of 113 to 43 the House asserted its prerogative again. A similar question arose in the Ashburton treaty for the settlement of the northeastern boundaries between Maine and the British possessions, and Mr. Webster deemed it prudent to gain the consent of Maine and Massachusetts to the settlement. These instances—and there have been many others which could be cited—are sufficient to show that the treaty-making power is not supreme in the sense claimed by many of its advocates, but that like all other powers enumerated in the Constitution, it must not be used for the destruction of others, but in mutual cooperation with all other powers equally supreme in their spheres, each must be used for the development of the Constitution in its true spirit and intent; it must work out its own destiny in accordance with the maxim *sic utere tuo ut non alienum laedas.*

If the claim of the advocate of the supremacy of the treaty-making power over the laws of the States declaring their domestic policies can be maintained, and the "fundamental laws of the States" as described by Judge Story, can be uprooted at the pleasure of the President and Senate, then indeed is our form of government changed; for it has always been contemplated that these rights remain with the States and are necessary to their complete autonomy and development. If the power asserted be admitted, there is not a domestic right now claimed by the people in their local communities, sanctioned it may be by the usage of a hundred years, that may not be surrendered to this imperial power. What then becomes of Judge Story's statement in section 1508, of his work. "A treaty to change the organization of the Government * * * would be void?" To override Judge Story's position would be to allow the alien to enter any community or State of the United States, protected under a treaty, without the obligations of citizenship and without the restraint which these obligations bring, and enjoy in some cases, even greater rights than the American citizen; he might become a voter without being required to comply with the laws of the State which alone gives the right to vote; he might become an officeholder, denied to a citizen of the State, without fulfilling the requirements of the local law; he might violate the laws of marriage with impunity, and feel himself free from the restraints of the laws controlling divorce; he might be permitted to murder, and yet defy the processes of the courts of the States to bring him to justice.

It is sincerely to be hoped that the agitation of this question will bring about a more general study of its far-reaching effects, and will increase the carefulness of those whose duty it is to negotiate treaties with foreign countries, in seeing that no rights are attempted to be accorded to aliens, that would destroy the delicate equilibrium of our governmental system, or might abrogate or annul the local laws declaring the local policies of the people, or that would attempt to place the alien in any position superior to that of the humblest American citizen.

I can close this paper in no better way than to quote the solemn and impressive language of Justice David Davis, in his opinion, in Ex parte Milligan (4 Wall., 120), delivered at a most critical period in our country's history, and which must ever remain a lasting monument to his lofty patriotism. Speaking of the effects of the Civil War on the Constitution, he said:

> No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the results of the great effort to throw off its just authority.[1]

H. ST. GEO. TUCKER.

[1] The limits of this paper do not permit the discussion and analysis of the cases decided by the Supreme Court of the United States from Ware *v.* Hylton (3 Dallas, 199), to Geofroy *v.* Riggs (133 U. S., 258), which are claimed to be opposed to the views expressed above. It is confidently asserted that no case has been decided by the Supreme Court involving the direct question herein discussed. All of the cases have decided questions collateral to the real issue involved in this paper.